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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1045

LOUIS D. REED, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where, in the prosecution of an offense of a homosexual nature, evidence of petitioner's post arrest admissions was received without objection or claim that such evidence violated the doctrine and principles of *Escobedo* v. *Illinois,* and, upon conviction, the judgment was affirmed, first by the District of Columbia Court of Appeals and then by the United States Court of Appeals for the District of Columbia Circuit, should not this Court refuse to exercise its jurisdiction to review on writ of certiorari?

COUNTER-STATEMENT OF THE CASE

In an information filed in the Criminal Division of the District of Columbia Court of General Sessions, petitioner was charged with committing a lewd, obscene, and indecent act, in violation of the provisions of D. C. Code, § 22-1112(a) (1967) (J. A. 26).[1] Upon his plea of not guilty, petitioner was tried without a jury, found guilty of the offense, and sentenced to pay a fine of $100 or, in default thereof, to serve 30 days in jail (J. A. 27).

Petitioner appealed to the District of Columbia Court of Appeals, which unanimously affirmed the judgment of conviction. *Reed* v. *District of Columbia,* D. C. App., 226 A. 2d 581 (1966). Thereafter, the United States Court of Appeals for the District of Columbia Circuit allowed an appeal and, following briefing and oral argument, affirmed, on October 2, 1967, the judgment of the District of Columbia Court of Appeals. On December 22, 1967, the United States Court of Appeals denied unanimously a petition for rehearing *en banc.*

The evidence adduced at trial was, in substance, as follows:

On January 13, 1966, at about 8:40 p.m., because of complaints from the management of the Woodward and Lothrop Department Store that its rest rooms were being frequented by sex deviates, Officer Graham of the Metropolitan Police Department made a routine check of its fourth floor men's rest room (J. A. 2, 4). Upon his arrival there with two fellow officers, Officer Graham, wearing "plain clothes," entered the rest room while the other officers waited outside (J. A. 2-3, 5).

As he entered, Officer Graham observed petitioner standing inside. Petitioner then "walked to a urinal, stood at the urinal, and clearly and openly fondled his erect penis." A short time later, petitioner "turned away from the

[1] References herein to "J. A." are to the joint appendix filed in the United States Court of Appeals for the District of Columbia Circuit and made a part of the record in this Court.

urinal, walked to where * * * [Graham] was standing, touched * * * [his] privates through * * * [his] trousers, and grabbed * * * [his] hand and said, 'Come on.'" (J. A. 2.)

Pulling away from petitioner, Graham reached into his pocket for his police badge. As he did so, an unidentified man who had been standing at another urinal "immediately left." Petitioner then "quickly walked back to the urinal," whereupon the officer identified himself and placed petitioner under arrest. Graham testified that "Mr. Reed became very nervous and attempted to brush me aside in an attempt to get to the door." (J. A. 2.)

Graham further testified that, as he escorted petitioner to Police Headquarters in a police vehicle,

> "* * * I advised * * * [petitioner] of his rights, and then, in the presence of Lt. Fochett, Pvt. Drouillard and * * * [petitioner], I recited the facts of the case, as I have recited them to Your Honor, to Lt. Fochett, and asked * * * [petitioner] if the facts that I had recited were correct or incorrect, and he stated that the facts were correct.
>
> "At the Morals Division office, I asked * * * [petitioner] why he acted as he did, and he stated to me, 'that he had a desire to engage in a sex act,' and he attributed this to the fact that his wife, at that time, was pregnant and he hadn't had sex relations with her for some time." (J. A. 3.)

Officer Drouillard of the Metropolitan Police Department testified that he and Lt. Fochett accompanied Officer Graham to the fourth floor men's rest room, which Graham entered as they waited outside. A few minutes after Graham entered, he was observed coming out with petitioner in his custody. Drouillard heard Graham advise petitioner "of his rights" and recount the events which

occurred inside the rest room. He heard petitioner admit on two occasions that the facts constituting the offense, as related by Graham, were correct, and that he had committed the offense because his wife was then "four months' pregnant [and] * * * he hadn't had sex with his wife for a long time." (J. A. 7.)

Petitioner testified in his own behalf that, on the evening of January 13, 1966, at about 8:00 p.m., while in the vicinity of the Woodward and Lothrop Department Store, "* * * I had some cramps and realized I had to go to the bathroom" (J. A. 10-11). He entered the building, inquired of a clerk as to the location of a rest room, and was directed to the fourth floor (J. A. 11). He remained in the fourth floor rest room for 40 minutes attending to his physical needs (J. A. 2, 10).

Petitioner said that he had been standing at a urinal and, as he turned away from it, he first noticed Officer Graham in the rest room (J. A. 13). He testified:

> "* * * as I was leaving the urinal to leave the Rest Room, Officer Graham stopped me, and I said, 'Come on,' and he said, 'Don't give me any trouble because I don't want to use the handcuffs again tonight.'" (J. A. 11.)

Petitioner stated that he was then arrested and asked to show some identification, after which he was escorted to a police cruiser (J. A. 11-12). He admitted that he was interrogated by the officers and that he told them that his wife was pregnant, but he denied that he had been "advised of * * * [his] rights" or that he made any admissions relative to the offense charged (J. A. 12). Upon his arrival at police headquarters, petitioner was again interrogated and then charged with the offense of "disorderly conduct for loitering" (J. A. 12, 30). Petitioner telephoned his brother, who came to police headquarters and posted

$25 collateral,[2] whereupon petitioner was released (J. A. 13).

At trial petitioner presented four witnesses on his behalf who testified that he has a good reputation for "truth and veracity" (J. A. 16, 18, 20, 22). None of these witnesses was asked to testify as to his reputation for good morals or for an absence of homosexual tendencies.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision of the court below is not in conflict with any applicable decision of this Court.

I

Citing and relying upon *Roviaro* v. *United States,* 353 U. S. 53 (1957), petitioner asserts a denial of due process on the ground that he was deprived "* * * of the possible benefit of testimony from a presumably neutral witness to his alleged crime, and thus denied a fair trial" (petition, p. 9).

There is nothing in the record to suggest that the alleged eyewitness was, in fact, an eyewitness. Petitioner thus speaks only of "the possible benefit" of the testimony of such unidentified person. In rejecting the same argument, the District of Columbia Court of Appeals said:

> "The only reference to the second man [the alleged eyewitness] is the officer's statement that as he reached in his pocket for a badge preparatory to making the arrest, the second man immediately left. On cross-examination the officer stated he had no conversation with the second man and made no attempt to stop him from leaving because he had committed no violation of the

[2] Not until thirty-five days after petitioner posted and elected to forfeit his collateral did he move to set aside the forfeiture (J. A. 30-31). The Government made no objection to his motion, notwithstanding the thirty-day limitation thereon provided for by Criminal Rule 3(d), District of Columbia Court of General Sessions.

law. The officer was not asked on cross-examination if the second man saw or was in a position to see * * * [petitioner's] actions. * * * [Petitioner] in his testimony made no reference to the second man. On this record we are not willing to hold that the arresting officer intentionally or negligently failed to obtain the identity of a corroborating witness." *Reed* v. *District of Columbia, supra,* at p. 583.

II

Petitioner alleges that receipt into evidence of police testimony respecting his uncounseled admissions violated the principles of *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Westover* v. *United States,* 384 U. S. 494 (1966). But plainly it did not. Even though petitioner had been "advised * * * of his rights" (J. A. 3), he made no request for counsel.[3] The record shows that petitioner was given permission to use the telephone, but it nowhere indicates that he either called, or attempted to call, an attorney. He telephoned his brother and asked him to bring money to police headquarters so that he could obtain his release by posting collateral (J. A. 13).

Even assuming, *arguendo,* that petitioner had *not* been apprised of his right to counsel, the rule of *Escobedo* was not controlling since the record shows that he made no request for counsel. As the Court there said (378 U. S. at 490-491):

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, *the suspect has re-*

[3] No *Miranda* question is here involved because the trial was completed prior to the date of *Miranda* v. *Arizona,* 384 U. S. 436 (1966). See *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

> *quested* and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution * * *." [Emphasis supplied.]

See also: *Johnson* v. *New Jersey,* 384 U. S. 719, 734 (1966). Compare: *United States* v. *Childress,* 347 F. 2d 448 (7th Cir., 1965), *cert. den.* 384 U. S. 1012 (1966); *United States* v. *Percodani,* 363 F. 2d 867 (2nd Cir., 1966); *United States* v. *Ardner,* 364 F. 2d 719 (4th Cir., 1966), *cert. den.* 385 U. S. 884 (1966); *Von Schmitt* v. *United States,* 366 F. 2d 773 (9th Cir., 1966); *Stith* v. *United States,* —— U. S. App. D. C. ——, 374 F. 2d 309 (1967); *Hintz* v. *Beto,* 379 F. 2d 937 (5th Cir., 1967).

Petitioner, in asserting that he did not waive his right to remain silent, cites and relies upon this Court's decision in *Westover* v. *United States,* 384 U. S. 494 (1966). However, the facts in that case are readily distinguishable from those in the case at bar. There, appellant had been arrested as a robbery suspect. After being taken into custody by Kansas City police, he was first questioned on the evening of his arrest and, later, during the following morning. On both occasions he denied any involvement in the crime. At no time was he given "appropriate warnings" by the Kansas City police.

Following interrogation by local police, appellant was interrogated by FBI agents for two and a half hours and, thereafter, he signed written confessions.

In reversing Westover's conviction, this Court said:

> "* * * There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in

> fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed." *Id.* at p. 496.

In the case at bar, there was credible evidence from which the court could have found that petitioner was "advised of his rights" prior to any interrogation (J. A. 2-3) and that the interrogation was of very brief duration. Petitioner was arrested at 8:40 p.m., transported to police headquarters, interrogated, booked, and permitted to call his brother, who came to headquarters with funds with which he could post collateral. At 9:40 p.m., one hour after his arrest, petitioner posted collateral and obtained his release from custody. (J. A. 2-3, 7, 11-13, 30.)

In disposing of petitioner's claim that he had not waived his right to remain silent, the District of Columbia Court of Appeals said:

> "* * * Here the officer testified that the admissions were made after * * * [petitioner] had been advised 'of his rights.' No attempt was made on cross-examination to have the officer elaborate on this statement. In view of the failure to object to the admissions and the failure to cross-examine respecting * * * [petitioner] being advised of his rights, the only conclusion is that * * * [petitioner], a man of intelligence and education, voluntarily, knowingly and intelligently waived his right to remain silent." 226 A. 2d at 584.

Petitioner urged, for the first time on appeal, in the District of Columbia Court of Appeals that police testimony respecting his uncounseled admissions was improperly received into evidence. He reasserts the same argument here.

In disposing of this argument, the District of Columbia Court of Appeals said, *inter alia:*

> "Where an *Escobedo* question is not raised at trial, thereby affording consideration by the trial court, the question will not be considered on appeal. * * *" 226 A. 2d at 584.

This holding is consistent with the decisions of many federal courts. See, e.g., *Robbins* v. *United States,* 345 F. 2d 930 (9th Cir., 1965); *Tyree* v. *United States,* 351 F. 2d 611 (5th Cir., 1965), *cert. den.* 385 U. S. 871 (1966); *United States* v. *Miller,* 353 F. 2d 724 (2nd Cir., 1965); *United States* v. *Bolden,* 355 F. 2d 453 (7th Cir., 1965), *cert. den.* 384 U. S. 1012 (1966); *Deans* v. *United States,* —— U. S. App. D. C. ——, 374 F. 2d 284 (1966). Cf. *Schmerber* v. *California,* 384 U. S. 757, 765-766, n. 9 (1966).

CONCLUSION

Since, as demonstrated, the decision of the court below is not, as alleged, in conflict with any applicable decision of this Court, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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